

1949

Tony Flemetis and Katina Flemetis v. J. William McArthur and Moselle McArthur : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Flemetis v. McArthur*, No. 7345 (Utah Supreme Court, 1949).
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In the Supreme Court of The State of Utah

TONY FLEMETIS and
KATINA FLEMETIS,
husband and wife,
Plaintiffs and Respondents,

— vs. —

J. WILLIAM McARTHUR and
MOSELLE McARTHUR,
husband and wife,
Defendants and Appellants.

Case No. 7345

FILE

4-19-19

CLERK, SUPREME COURT, U

Brief of Respondents

Appeal From The District Court Within and for
Duchesne County, State of Utah

THERALD N. JENSEN
Attorney for Plaintiff
and Respondents

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Respondents' Brief

STATEMENT OF FACTS

In order that the court will have a clear picture of the background out of which this lawsuit arose, plaintiffs deem it necessary to point out the following facts in addition to those set forth by the defendants.

The escrow sales agreement covered four 40's of good land and one 40 of arid, unimproved land. The aggregate purchase price was Twelve Thousand Dollars (\$12,000). The land is all in the same section. The defendants entered into possession thereof and paid sufficient of the purchase price that they were entitled, pursuant to the terms of the agreement, to receive the deeds and water certificates on

the good land. The appellants also received the assignments on the Indian lease lands which were held by plaintiffs and used in connection with the entire farm. The defendant McArthur testified (Abstract bottom page 31) that the poor 40 was "good for nothing". Nevertheless Two Thousand Dollars (\$2,000) of the twelve-thousand-dollar purchase price was held back pending the clearing of title defects on this poor 40. It is this Two Thousand Dollars (\$2,000) and interest which plaintiffs sue to recover.

On August 8, 1946, after defendants had been in possession of all of said property, including said Indian leases, for in excess of one year they sold and transferred the good land and the Indian leases to one J. T. Bergstrom, a third party. Moreover, on June 14, 1945, they granted a ten-year lease on the oil and gas rights under the poor 40 to the Sinclair Wyoming Oil Company for a period of ten years, namely from June 14, 1945, to June 14, 1955; and finally, on January 6, 1947, they sold the poor 40 to the same J. T. Bergstrom and the said deed signed by J. W. McArthur was left at the Roosevelt State Bank for the signature of his wife, where it reposed at the time suit was filed. Bergstrom paid valuable consideration for this deed (Abstract pages 14 and 15).

Plaintiffs maintain that all conditions precedent in the contract have been performed by them and that even if there were now some title defect, defendants would not be entitled to rescind the contract as to the poor 40 because they have taken the good portions of the land and all of the water right and the Indian leases and have sold and assigned the same, and they have leased the underground rights on the poor 40 in question and have in truth and in fact ex-

ecuted a deed to the fee title thereof, which deed is held by the Roosevelt State Bank for delivery to the said Bergstrom. Defendants cannot rescind under such circumstances.

I will proceed first to meet the three arguments of defendants as set forth in their brief.

I

RESERVATIONS IN THE PATENT

The first point which the defendants raise is that the plaintiffs have failed to perform their conditions precedent inasmuch as there is a reservation in the patent which the defendants claim constitutes a cloud or defect in the title and affects its marketability. This was an extremely interesting point of law a few years ago. At that time there was some question as to whether or not such a reservation constituted a defect in the title. There is no longer any question, and I am certain that the following authorities will amply sustain the statement I have just made. If the court were to hold with the defendants on this proposition, it would mean the opening of the floodgates of litigation as the courts have stated. Practically all of the warranty deeds which we have made for years would be subject to suit.

The reservation set forth in the patent at Entry 4 in the abstract was inserted in the patent pursuant to an act of Congress. The act is as follows and may be found in Title 43, United States Code Annotated, Section 945:

“Reservation in patents of right of way for ditches or canals. In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by the Act of August 30, 1890, west of the one hundredth meridian, it shall be expressed that

there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. (Aug. 30, 1890, c. 837, Section 1, 26 Stat. 391.)”

This section in U. S. C. A. is annotated. The important annotations, however, appear in the Cumulative Annual Pocket Parts of 1947. There the controlling cases are set forth.

Defendants in their brief, page 10, state that, “by such reservations the courts have construed the same to be a limitation of title . . .” The defendants fail, however, to set forth a single case or authority which sustains their position. The case of **Griffith vs. Cole**, 264 Federal 396 cited by defendants in their brief at the top of page 10 is not remotely in point. I am unable to find the other case cited, that of **U. S. vs. Haga**, 271 Federal 41, cited at the top of page 10 of the brief. None of the cases set forth on pages 12 and 13 appear to be in point. So much for defendants’ brief on this point.

Maupin on **Marketable Title to Real Estate**, 3rd Edition, page 383, states that the purchaser must take notice of public statutes restricting the use of the granted premises; and such restrictions constitute no breach of the covenant of warranty.

The fundamental point to be borne in mind in considering this objection raised by the defendants is that we have a public statute involved, and the same must be noticed by all parties dealing with land.

The rule is well stated by Brandeis in the **Farmers & Merchants Bank vs. Federal Reserve Bank**, 262 U. S. 649, 43 Supreme Court 651, 67 L. Ed. 1157, and 30 A. L. R. 635 as follows:

"Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principal embraces alike those laws which affect its construction and those which affect its enforcement or discharge."

There are two recent cases which are squarely in point and which, in my judgment, are controlling in reason and in authority on the specific point at issue. These two cases, one decided by the Supreme Court of the State of Washington on January 17, 1942, and one decided by the supreme court of South Dakota on January 22, 1942, were, of course, decided independently. They both arrive at the same conclusion, and they both involve as a defense the specific statute which has been raised by the defendants in this case. I might point out, however, that in my judgment the Supreme Court of the State of Washington has done a much better job of analysis, perhaps because they are a little closer to the scene of irrigation here in the West. These cases are:

Walsh vs. Bellamy, (South Dakota) 2 Northwestern 2nd 102. In this case the parties entered into a contract whereby the plaintiff obligated herself to convey the premises by good and sufficient warranty deed free and clear of all liens and encumbrances and to furnish abstract of title showing the title to the premises to be in merchantable condition and free and clear of all liens and encumbrances. Please observe that this is almost identically the provision of the Flemetis-McArthur contract before us. The defendant pleaded as a defense that the title was not free and clear of liens and encumbrances because of the right of way reservation in the patent which was inserted pur-

suant to the Act of Congress which I have heretofore quoted in full in this brief.

The court quotes from Maupin on Marketable Title and sets forth the cases which are cited in that work in support of the doctrine hereinabove announced, namely the case of **Neeson, et al vs. Bray**, 19 New York Supplement 841, and the case of **Richardson-Kellett Company vs. Kline**, 70 Florida 23, 69 Southern 203. The court points out that in the latter case it was held that in the conveyance of a part of the Everglades swamp land a reservation of a right in favor of the State to enter upon the land for the purpose of constructing a system of drainage canals, if necessary, did not render the title defective. The court also cites the case of **In Thomas vs. Wood**, 37 Federal 2nd 856, which appears to hold the same as the Kline case. The court in that case states:

“The restrictions are a matter of public knowledge and the parties dealing with the title contract with reference thereto, and the restrictions become a part of the contract of sale and purchase.”

Apparently the only case which is cited to the contrary is the case of **Cosby vs. Danziger**, 38 California Appeal 204, 175 Pacific 809. That case, however, is not an authority against the general propositions hereinabove cited. The **Walsh vs. Bellamy** case under West Keynote 7 at page 105 of 2 Northwest 2nd distinguishes that case, and the **Cosby vs. Danziger** case is even more clearly distinguished in the **Washington** case which I will presently cite. The important point of distinction to notice is that in the **Cosby vs. Danziger** case the patent hadn't been recorded, and the buyer didn't know under what chain of title he would fall. The case is clearly distinguishable and is distinguished by

both of these recent 1942 Supreme Court decisions.

I think the best case on the subject is that of **Dopps vs. Alderman**, (Washington) 121 Pacific 2nd 388. In this case there was a contract for sale by good and marketable title and there was pleaded the specific reservation which is pleaded by defendants in this action, and the Supreme Court of the State of Washington holds that that reservation in the patent does not constitute a defect in the title. The court makes a good analysis of the entire subject, sets forth the authorities and texts, and distinguishes the cases which were cited in opposition to the doctrine. The distinction in the case of **Cosby vs. Danziger** is pointed out, and there are additional cases cited for support of the proposition first hereinabove advanced, namely that such a reservation in the patent does not constitute a defect in the title.

It is my understanding that defendants do not contend that the existence of the Indian canal which runs across the 40 in question constitutes any defect in the title. They did not so contend at the trial and if I read their brief correctly, do not apparently so contend on appeal, and I am certain that even if they were now to make such contention that the same could not be sustained. They, of course, knew that large canal was on the premises when they made the contract. The court so found. The leading case on this proposition where there is a visible canal easement is **Schurger vs. Moorman**, decided by the Supreme Court of Idaho in 1911, 117 Pacific 122. This case is cited in all of the texts and by most of the subsequent cases. In that case there was a canal running across the land of the plaintiff, which is a parallel situation to the Indian canal which runs across the 40-acre parcel involved in this law-

suit. The issues involved in that case are well set forth by the court at page 123 as follows:

"The appellant contends that the easement and right of way for a canal across the lands constitutes an incumbrance, and would amount to a breach of the covenant against incumbrances on the land. The respondent, on the other hand, insists that an easement and right of way for an irrigation canal, being an obvious and notorious servitude upon the land and being of permanent character and essential for the reclamation of an arid country, does not fall within the category of incumbrances against which a covenant of warranty runs."

The court holds that the existence of a canal which is a permanent easement did not impair the marketability of the title. The essence of the decision and of the great many cases which support the same proposition is that parties who contract concerning a piece of property over which runs visible easements such as a highway or a large permanent waterway are presumed to have had knowledge of the existence of such easements and to have contracted with reference to them. This Idaho case cites a great number of cases from throughout the United States on this general proposition, and all of these cases with the exception of a few old Eastern decisions sustain the proposition which I have mentioned and which is set forth in the Idaho case.

Brewster on Conveyancing, Section 203, states:

"In cases where there is a physical burden of this sort, which is visible, there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to this plain, existing burden, and that the vendor on the one hand demands, and the vendee on the other pays, only the fair value of the land as vis-

ably incumbered. Therefore, it is said such burdens, by way of open and notorious easements, are not really incumbrances within the meaning of this covenant, because the real subject-matter of the dealings between the grantor and the grantee is the land, subject to visible easements."

See the case of **Sisk vs. Caswell**, a California case, in 122 Pacific 185. There is a presumption, the California court states, under all authorities that the parties act with reference to a plain, existing easement or burden when they contract pertaining to the land. This is so of those burdens or easements which are permanent in their nature.

See also the case of **Feldhut vs. Brummitt**, a Kansas case, reported in 150 Pacific 549 and decided in 1915. This case holds that an established irrigation ditch, plainly observable on the property was not an encumbrance to the extent of being a breach of covenant. This Kansas case cites the Colorado case of **Erikson vs. Whitescarver**, 57 Colorado 409, 142 Pacific 413. The Kansas case, however, does not carefully analyze the Colorado case and apparently thinks that the Colorado case is a contrary decision; whereas, in truth and in fact, it is not as a reading of the case will clearly disclose.

The Colorado case last referred to involved a sale of some building lots in the City of Denver. There were some ditch rights of way across these city building lots. The court held that they constituted a breach of the warranty against encumbrances. The court, however, makes the following significant statement:

"What might be the rule where lands encumbered by a right of way for an irrigation ditch and conveyed for agricultural purposes of which the vendee had notice at the time of the con-

veyance is not involved and what we have said on the subject of any such easement is confined and limited to the facts before us."

II

THE STRAY MORTGAGE AT ENTRY 10 OF ABSTRACT

The appellants next complain of the mortgage shown at Entry 10 in the Abstract of Title. This mortgage was executed by a stranger to the title. It does not specifically purport to even cover the 40 in question. It covered the water and rights of way of the Farmers Irrigation Company which ran across Section 1, Township 1 South, Range 4 West of the Uintah Special Meridian, of which this 40 was a part. The court found, and the evidence sustains the finding, that no portion of the canal or lateral system of the Farmers Irrigation Company touched the 40 in question, and this 40 had no water right whatsoever in the Farmers Irrigation Company or in any other company at all. I think the rule is well established that a mortgage executed by a stranger to the title is not a defect so long as there is no occupant of the property claiming under such instrument and the purchaser has no actual knowledge of a valid claim by parties who are strangers to the title (Title Standard No. 9 Utah State Bar, Bar Bulletin August 19, 1947, and cases there cited). Because of the fact that no portion of the Farmers Irrigation Company canal or lateral system touched the land in question and because it is an arid 40 having no water right whatsoever, this mortgage by a stranger to the title covering waters and easements does not constitute a defect impairing the marketability of the title.

It is true there were some ditches on the 40 in question which were used to transport waste water from the Dry

Gulch Irrigation Company which was transported through the Farmers Irrigation Company canal, but these small ditches were constructed subsequent to the date of the execution of the stray mortgage. The mortgage was executed and recorded in the year 1935. The ditches were not constructed until after the plaintiffs acquired the property in 1939. Said mortgage executed four years before these waste ditches were constructed could not possibly affect them.

It will also be observed that an auditor's tax deed on the property was executed on April 10, 1937. The case of **Hanson vs. Burris** 46 Pacific 2nd 400 at pages 406 and 407 stands for the proposition that a purchaser from the County takes a new and complete title in the land under an independent grant of sovereign authority which bars or extinguishes all prior claims.

Defendants cannot successfully set up this stray mortgage in defense of the action. I repeat there was no mortgage on any water right belonging to this 40-acre tract simply because there was no water right whatsoever, and the mortgage was not upon any easement or right of way over this 40, first, because no ditch was constructed until after the mortgage was given; second, because no right of way was ever deeded to the Farmers Irrigation Company (the abstract of title shows none); third, no such right of way was acquired by the Farmers Irrigation Company by prescription because the prescriptive period could not have run; fourth, a new title was initiated in plaintiffs through the issuance of an auditor's tax deed after the mortgage was given; and fifth, defendants used these ditches themselves for the benefit of both their good and poor land, and they are in no position to complain because

of their existence. They knew that they were there at the time they made the contract, and they must be held to have made the contract in contemplation of these small waste ditches.

III

CAROLINA(E) THOMPSON DEED

In their brief defendants for the first time claim a defect in the title because at Entry 8 of the abstract of title the quit claim deed from Duchesne County runs to one Carolina(e) Thompson. This alleged defect was never urged at the trial, was not argued orally, and was not so much as mentioned in the written trial brief filed by the defendants. The only defects urged or considered at the trial or in the briefs were those hereinbefore set forth under Topics I and II pertaining to the reservations in the patent and the stray mortgage at Entry 10 of the abstract of title.

Defendants are put to rather strange and forced seasoning when they state in their brief at the bottom of page 10 that, "There is no instrument in said abstract disclosing that the title of Carolina Thompson has been divested of him (sic) or that his wife (sic) has been divested of her inchoate right." Throughout all of the months of preparation on this case and the intensive work done at the trial it never occurred to defendants that the name Carolina(e) Thompson referred to other than a female. Now the first time, in an effort to defeat plaintiffs of their just dues under the contract defendants have discovered that the word Carolina(e) is of masculine gender! Carolina Thompson made, executed and delivered deed to Flemetis November 15, 1939.

* * * * *

I believe that the foregoing cases and arguments amply meet the contentions of defendants in their brief. As pointed out above, however, the position of the defendants is that even after having accepted all of the good land and all of the water under the contract and having sold and disposed of the same and after having accepted and transferred the Indian leases and after having conveyed the underground rights on the poor 40 in question and having executed a deed to J. T. Bergstrom therefor in 1947, two years after the contract was made, that they are now in a position to rescind the contract as to this worthless 40 and withhold the payment of Two Thousand Dollars (\$2,000) on the contract.

The defendants cannot rescind the contract under the facts and circumstances disclosed under any theory of the case.

IV

REMEDY OF RESCISSION

In considering the doctrine of rescission the court should bear in mind these propositions:

1. There must be no other adequate legal remedy.
2. Rescission is a proceeding in equity, and it must be just and equitable under the circumstances of the case.
3. The defendants must show that they can place the other party in statu quo, that is the party pleading rescission must be able to restore the consideration.
4. Since rescission is a proceeding in equity the party claiming it must act in good faith and within a reasonable time. An unreasonable delay prevents the imposition of the doctrine.

Defendants, in order to invoke the doctrine of rescis-

sion, must come into court in an equitable position themselves. They do not thus present themselves according to the admitted facts, because:

(1) Defendant McArthur knew of the existence of the small ditches and of the Indian canal upon the 40 in question at the time he made the contract, and he certainly knew of their existence after he took possession of the property.

(2) Notwithstanding this fact and after his perfect knowledge of the condition of the premises, he made and entered into a written ten-year lease on the underground rights covering the forty in litigation to the Sinclair Wyoming Oil Company. That lease appears in the abstract of title at Entry 24. Defendants receive Fifty Dollars (\$50) annual rental. They have been receiving that rental and presumably are still receiving it, and they have the right also to receive one-eighth of the oil and gas produced and sold from the premises. The fact of their execution of that ten-year lease on the underground rights on this particular 40 would bar them from bringing a proceeding for rescission if there were no other principal involved. How can these defendants have the hardihood to come into a court of equity and ask this court to compel the plaintiffs to take back this worthless land and lose Two Thousand Dollars when they have executed a ten-year lease on the underground rights and have received the rental therefrom, all of which was done after the defendants went into actual physical possession of the land and knew of the existence of the canal and ditches thereon, and after they had actually used these ditches for the irrigation of a portion of this 40-acre parcel?

(3) The defendants did more than this. After they had gone into possession and after they had leased the underground rights on the 40 in question, they proceeded in full knowledge of all of the facts to sell the entire water right and all the valuable 40's of the farm which they had contracted to purchase. In order to have rescission the defendants must be in a position to restore to the other party the consideration received. It is utterly impossible for the defendants to make any such restoration of the property because they have sold the good land and water rights as well as the Indian leases which were covered by the contract. They have sold the underground rights on the 40 in question, and they have, in truth and in fact, sold the 40-acre parcel itself.

(4) Plaintiffs introduced in evidence the three-hundred-dollar check dated January 6, 1947, which defendant McArthur received from one J. T. Bergstrom, a third party, in payment of the purchase price for this 40-acre tract. We also introduced the quit claim deed which defendant McArthur executed thereon and left at the Roosevelt State Bank for the signature of his wife. So we have a situation wherein the defendants have actually sold this land which is the subject of our present lawsuit and upon which they seek a rescission. This is contrary to all of the law concerning this doctrine, and it is utterly impossible for defendants to have a rescission of this contract when they have sold the land which is the subject of the suit. In order to have a rescission they would have to restore the consideration, namely the good land as well as the poor land, and take their money back. Defendants are not in a position to do this. They do not offer to restore anything. They do not

offer to do equity. They seek to get out of a just obligation to pay Two Thousand Dollars to plaintiffs.

(5) Let me point out one other reason why McArthur cannot have a rescission. It is unquestioned that defendants received transfer of the Indian lands referred to in the contract, and it is further unquestioned that defendants irrevocably transferred these Indian lands to Bergstrom, a third party, and if plaintiffs are now compelled to take back this 40-acre parcel of land, they stand deprived of the Indian lease lands which plaintiffs yielded to defendants when the contract was made. It is utterly impossible to find that defendants under any theory of the case are entitled to rescission.

(6) An unreasonable delay prevents the imposition of the doctrine. 8 **Thompson on Real Property** at page 589 sets forth the rule as follows:

"The right to rescind may be lost by laches. The law requires the injured person to seek his remedy without unreasonable delay after discovering the facts justifying rescission. A person cannot be deprived of his remedy in equity on the grounds of laches unless it appears that he had, or ought to have had, knowledge of his rights. Upon discovery of the grounds entitling him to rescission, he must act with reasonable promptness to avoid the imputation of acquiescence, and he must act under circumstances consistent with good faith. The period within which the right of rescission must be exercised is to be determined by the facts peculiar to each case."

I do not think that there can be any question but what defendants in this case have not acted with reasonable dispatch in asserting rescission. The contract was made in 1945, and defendants entered into possession of the property and after becoming fully apprised of all of the facts

and circumstances concerning the same, they sat by for a period of two years and as late as January 6, 1947, treated the contract now before the court as being in full force and effect because on the latter date they delivered the deed to the 40-acre tract, which is the subject of this suit, at the Roosevelt State Bank in favor of the third party, Bergstrom.

If there were now some title defect (which we deny) defendants' remedy would be for damages and not for rescission.

CONCLUSION

All principals of law and equity and all evidence, in my judgement, lead to the conclusion that judgement in this case must be sustained. This scheme of defendants to get everything that was any good from plaintiffs, namely the good land, the water rights, and the Indian lands; and to try and turn back an unimproved, rocky, arid 40-acre tract now encumbered by a ten-year lease of underground rights and an outstanding deed in favor of a third party Bergstrom on the surface rights; and retain Two Thousand Dollars of the agreed consideration, smacks of bad faith if not something worse. This court should not lend its aid thereto.

Respectfully submitted,

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